UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

Saginaw Chippewa Indian Tribe of Michigan, et al.,

Plaintiffs,

v.

Jennifer Granholm, et al.,

Defendants,

Case No. 05-10296-BC
Honorable Thomas L. Ludington

Saginaw Chippewa Indian Tribe of Michigan's
Response to U.S.'s Motion for Partial Summary Judgment

CONCISE STATEMENT OF ISSUE PRESENTED

Summary judgment is only appropriate where there is no genuine dispute of material fact. While the Tribe did not join or oppose the U.S. Motion for Partial Summary Judgment, the Court and parties share an interest in having that motion decided on facts in the record. The U.S. relies on various primary-source documents that all parties' experts cited, but that are not yet in the record. Should the Court consider additional, relevant, primary-source documents to decide the U.S. Motion for Partial Summary Judgment?

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Federal Rules of Civil Procedure

Fed. R. Civ. P. 56

Federal Rules of Appellate Procedure

Fed. R. App. P. 10

INTRODUCTION

The U.S. filed a Motion for Partial Summary Judgment (the "Motion") on the limited question of whether "the plain language and the context surrounding the Treaties compel the conclusion that the Isabella Reservation was established by the 1855 and 1864 Treaties."[1] In support of its motion, the U.S. provided a Statement of Facts that details many aspects of the relevant history, but the U.S. relied solely upon the content of its expert reports to support the Statement.[2] The U.S. quoted from the primary-source documents that the experts relied on, but did not *file* those documents with the Court, even though most do not yet appear elsewhere in the record.[3] Nor did the U.S. discuss certain documents that the parties' experts relied upon and that the Tribe believes should also be before the Court as it decides the Motion, and as the Court determines what issues should be reserved for trial. The Tribe provides here a summary of the relevant historical record with attached primary-source documentation so that the Court has before it a complete factual record.

STATEMENT OF FACTS

I. Lead-in to the 1855 Treaty

In treaties before 1855, the Saginaw, Swan Creek, and Black River Bands of Chippewa ceded their aboriginal lands in Michigan and agreed to move west in exchange for certain

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[1] U.S. Motion for Partial S.J. (March 5, 2010), Doc. 222 at 2. The Tribe did not oppose the Motion, but did not join it.

[2] At the Court's request, all parties provided the Court with electronic courtesy copies of their respective expert reports and the documents supporting those reports, and the Tribe filed full copies of both its own and the State's expert reports. *See, e.g.*, Tribe's Motion to Exclude the Testimony of Drs. Theodore Karamanski and Anthony Gulig (Nov. 23, 2009), Doc. 190, attaching Anderson Main Rep. at Ex. A, Doc. 190-3; White Main Rep. at Ex. B, 190-5; Gulig Main Rep. at Ex. D, Doc. 193-8; Karamanski Main Rep. at Ex. E, Doc. 193-2. But none of the parties have filed all, or even most, of the expert reports' supporting exhibits.

[3] *See* Fed. R. App. P. 10(a) (the record on appeal includes "original papers and exhibits *filed* in the district court") (emphasis added). Accordingly, the courtesy copies of the exhibits have not yet been introduced into the record.

payments.[4] But these promises went unfulfilled and most Band members refused to remove. By the early 1850s, as federal policy shifted away from removal and toward the creation of reservations, it became apparent that there was a need to negotiate a new treaty that would allow Band members to remain in Michigan upon their own land.

Indications that the federal government set out to create the Isabella Reservation as a distinct, permanent, and bounded territory as far from white settlements as possible appear in the record well before the Treaty of 1855 was executed. For example, in December 1852, Methodist Missionary George Bradley (a later federal Indian agent to the Bands) wrote to Michigan Senator Lewis Cass and stated:

> [T]he Chiefs and older men come and ask the question, what they shall do to help their children to a permanent home, say they shall die soon - and they would like to see their children have a permanent home. . . . In my opinion the best policy is to colonize them and give them a territory of land say 6 miles square somewhere in the Northern part of this Lower Peninsula, . . . and let each man or family own his land in fee simple with the bare prohibition to prevent him from selling or alienating to any white man.[5]

In his 1853 Report, architect of federal Indian-reservation policy and U.S. Commissioner of Indian Affairs George Manypenny recognized that the Michigan Indians

> have the right to a home west of the Mississippi should they desire to emigrate; but there is no prospect of their ever being willing to do so, and the citizens of Michigan, it is understood, entertain no desire to have them expelled from the country and home of their forefathers. Suitable locations, it is understood, can be found for them in the State, where they can be concentrated under circumstances favorable to their comfort and improvement, without detriment to State or individual interests, and early measures for that purpose should be adopted.[6]

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[4] *See*, *e.g.*, Treaty with the Chippewa (Swan Creek and Black River bands) (May 9, 1836), 7 Stat. 503; Treaty with the Chippewa (Saginaw bands) (Jan. 14, 1837), 7 Stat. 528; Treaty with the Chippewa (Saginaw bands) (Dec. 20, 1837), 7 Stat. 547; Treaty with the Chippewa (Saginaw bands) (Jan. 23, 1838), 7 Stat. 565.

[5] *See* Bradley to Cass (Dec. 14, 1852), SC028690-95, SC028694, cited in Anderson Main Rep. at 8, attached as Ex. 1.

[6] 1853 Annual Report of the Commissioner of Indian Affairs Report ("COIA") at 244, SC011243-45, SC011245, cited in White Main Rep. at 6, attached as Ex. 2.

The then-current Michigan Indian Agent Henry Gilbert expressed a similar sentiment in March of 1854 when he wrote to Commissioner Manypenny proposing

> to set apart certain tracts of public lands in Michigan in locations suitable for the Indians & as far removed from white settlements as possible & within which every Indian family shall be permitted to enter without charge & to own & occupy eighty acres. The title should be vested in the head of the family & the power to alienate should be withheld. All the land embraced within the tract set apart should be withdrawn from sale & no white person should be permitted to locate or live among them. . . . [7]

But Agent Gilbert urged haste in implementing the plan because, "[t]he lands of Michigan are all in market & are rapidly being taken up for cultivation and settlement & the difficulties attending the selection will increase from year to year."[8]

Days later, Methodist missionary to the Bands George Smith wrote to Commissioner Manypenny and stated, "[y]our recommendation of the colonizing of the Indians in our own state is the only thing in my judgment that can be done with safety to the Indians. . . . I am convinced (the Chippeways of Saginaw) [sic] it would meet with their hearty concurrence."[9] He asked "[c]an anything be done to expedite this measure[?] There is plenty of unoccupied territory in this state now, but soon it will be too late."[10]

Accordingly, in early November 1854, Smith and fellow missionary P.O. Johnson wrote

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[7] Gilbert to Manypenny (March 6, 1854), SC022306-25, SC022307, cited in Anderson Main Rep. at 9; White Main Rep. at 6-7, attached as Ex. 3. Agent Gilbert called this "the only plan" that could satisfy the government's Indian-policy goals because "[t]hey are now scattered throughout the whole central & northern portions of the lower peninsula of Michigan & cannot be effectually reached by teachers & missionaries unless they are colonized & have a permanent home with an interest in the soil." *Id*. *See also* Smith to Manypenny (March 14, 1854), SC013067-70 (orig.), SC002289-90 (T.), cited in White Main Rep. at 7-8 (Smith as missionary to Bands advocated "colonizing the Indians in our own state" and making land inalienable for a number of years and exempt from taxation), attached as Ex. 4.

[8] Gilbert to Manypenny (March 6, 1854), SC022309-10, Ex. 3.

[9] Smith to Manypenny (March 14, 1854), SC002289, Ex. 4.

[10] *Id.*

to J.P. Durbin, head of their missionary society, with the specific request that "the entire County of Isabella to be taken out of market. . . . [W]e have no doubt but in a short time nearly all [Band members] could be induced to settle on this land." [11] But here, again, the missionaries urged haste.[12]

Thereafter, the federal government acted to withdraw two blocks of land in anticipation of an appropriate treaty that would designate the areas as reservations. In December of 1854, Commissioner Manypenny, who had received the missionaries' letter from Durbin, forwarded it to John Wilson, Commissioner of the General Land Office, "ask[ing] that you reserve from public sale the lands designated" per the letter from Smith and Johnson. [13] That same month, Commissioner Wilson recommended to Robert McClelland, Secretary of the Interior, "for the reasons stated [by Commissioner Manypenny], the withdrawal from market and reservation for Indian purposes the lands in Isabella County, Mich."[14] To indicate the withdrawal in Isabella County, Commissioner Wilson enclosed a map shading in "townships 13, 14, 15, and 16 north, of ranges 3, 4, 5, and 6 west of the Michigan meridian, in the Ionia district, the whole of which are to requested to be reserved."[15]

In April 1855, McClelland forwarded this correspondence to the President of the United States stating that "the withdrawal appears to be desired by the Indian office," in order to

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[11] Smith and Johnson to Durbin (Nov. 8, 1854), SC026785-88 (unlabeled T. attached), cited in White Main Rep. at 8, attached as Ex. 5. The missionaries focused on Isabella County in particular because it had good farmland and was "removed at a distance from the settlements and [had] very little land purchased, and what is, is for the pine." *Id.*

[12] *Id.* ("The importance of the contemplated measure can scarcely be conceived of and the withholding of lands from sale is indispensable to our success, as without this as soon as we begin to buy others would commence[.]").

[13] Manypenny to Wilson (Dec. 11, 1854), in I Kappler: Laws: Pt. III: Exec. Orders Relating to Reserves 846-47 (1904), SC005230-33, SC005230, cited in Anderson Main. Rep. at 10, attached as Ex. 6.

[14] Wilson to McClelland (Dec. 20, 1854), *id.*, SC005230-31, Ex. 6.

[15] *Id.*

effectuate the contemplated treaty.[16] He noted that the agreement would allow the Indians to farm, but would also allow them to be

> to the greatest possible extent separated from evil example or annoyance of unprincipled whites, who might be disposed to settle in their vicinity, or within their midst, after farms already opened by them had rendered the surrounding land more valuable, is apparent, and I have no hesitation in recommending your sanction to the withdrawal of the lands indicated in each of said communications from the Land Office[.][17]

On May 14, 1855, President Franklin Pierce signed an executive order "withdraw[ing] all of the vacant land in Isabella County . . . with the express understanding contained in the letter of the Secretary of the Interior[.]"[18]

With the Executive Order in place, Gilbert encouraged Manypenny to quickly authorize treaty making.[19] In addition to the Bands' desire to settle their affairs as soon as possible, Gilbert wrote that "the public lands in Michigan are being so rapidly absorbed that in a few months it will be scarcely possible to provide them with homes in suitable locations without interfering with settlements already made or contemplated by whites."[20] Near the same time, Gilbert created a map considering possible permutations of the reservation by drawing on an 1854 Survey by the Michigan Surveyor General's Office.[21] He drew a multi-township square, shaded in purple and light blue in the center of the state.[22] According to the color code in the upper-right-hand corner of the map, the shaded land was "[w]ithdrawn for Indian purposes in

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[16] McClelland to Pierce (Apr. 12, 1855), *id.*, SC005231, Ex. 6. The enclosed map has not been located.
[17] *Id.*
[18] Exec. Order (May 14, 1855), *id.*, SC005231, Ex. 6.
[19] Gilbert to Manypenny (Apr. 12, 1855), SC013112-14 (orig.), SC022667 (T.), cited in White Main Rep. at 8, attached as Ex. 7.
[20] *Id.*
[21] Gilbert's notations on survey prepared by Michigan Surveyor's General's Office (Feb. 18, 1856, with notations from 1854), cited in White Main Rep. at 8; White Map Ex. Figs. 1-a-d, Doc. 190-6, color versions attached as Ex. 8.
[22] *Id.*

anticipation of contemplated arrangements by order of the President of May 14/55 and Instrns. to R&R of May 16/55."[23]

Also in accordance with the Executive Order, the General Land Office noted in its tract books for each of the townships: "[t]his Township reserved for Indian purposes."[24] Likewise, on its survey maps of each of the townships, the General Land Office noted "[t]his Tp. withdrawn and withheld for Indian purposes by Order of President of May 14/55."[25] The words "Withheld for Indians" were inscribed across most of the surveys.[26]

II. 1855 Treaty

Against this backdrop, Commissioner Manypenny and Agent Gilbert concluded a treaty with the Bands on August 2, 1855.[27] The Bands relinquished annuities owed to them under previous treaties[28] in exchange for, inter alia, the United States' withdrawal "from sale for the benefit of said Indians all the unsold public lands within" two tracts of land that were part of the larger area already the President had already withdrawn.[29] The Indians were to select "[s]ix adjoining townships of land in the county of Isabella" and "[a] tract of land in one body, equal in extent to two townships, on the north side of Saginaw Bay[.]"[30] The Treaty further detailed that these tracts would be allotted to Band members "under the same rules and regulations, in every

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[23] *Id.*
[24] Bureau of Land Management Tract Books of U.S., Michigan, Isabella County, SC036423, cited in White Main Rep. at 8, example attached as Ex. 9.
[25] GLO: Isabella County Plat Maps, available on-line at http://www.glorecords.blm.gov/, *last visited* March 2, 2010, cited in White Main Rep. Map Ex. Fig. 2-a-z, Doc. 190-6, color excerpts attached as Ex. 10.
[26] *Id.* The maps eventually also noted which townships were restored to public domain by letter of the Indian Office in 1859, and which of the townships were ultimately set aside "for the exclusive use, ownership, and occupancy of the Indians" under the 1864 Treaty. *Id.*
[27] Treaty with the Chippewa of Saginaw, Etc., Aug. 2, 1855, 11 Stat. 633 ("1855 Treaty"), attached as Ex. 11.
[28] 1855 Treaty at Art. III.
[29] *Id.* at Art. 1.
[30] *Id.*

respect, as are provided by the agreement concluded on the 31st day of July, A.D. 1855, with the Ottawas and Chippewas of Michigan, for the selection of their lands."[31] Under the Ottawa & Chippewa Treaty, "[e]ach Indian entitled to land under this article may make his own selection of any land within the tract reserved herein for the band to which he may belong . . . ."[32]

In his 1855 report to Congress, Manypenny described the 1855 Treaty as offering permanency, even while it would allow for individual land selections within the Reservation boundaries:

> New conventional arrangements, deemed requisite with the Indians in the State of Michigan, have been entered into with the confederate Tribe of Ottowas [sic] and Chippewas, the Chippewas of Saginaw, and the small band of Chippewas of Swan [C]reek. By them the Indians are to have assigned permanent homes, to be hereafter confirmed to them, in small tracts, in severalty.[33]

And Manypenny reiterated the then-current federal policy of making permanent reservations that act as enclaves for a tribe:

> [The Indian] must have a home; a fixed, settled, and permanent home. . . . The policy of fixed habitations I regard as settled by the government, and it will soon be confirmed by an inevitable necessity; and it should be understood that once those Indians who have had reservations set apart and assigned to them, as well as those who may hereafter by treaty have are not to be interfered with in the peaceable possession and undisturbed enjoyment of their land; . . . let it be understood that the Indian's home is settled, fixed, and permanent, and the settler and the Indian will, it is believed, soon experience the good effects that will result to both.[34]

III. The inter-treaty period

Methodist missionary Reverend W.H. Brockway traveled with one of the first contingents of Indians to go to Isabella County to select land, and he reported back about its

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[31] 1855 Treaty at Art. II §2.
[32] Treaty with the Ottawa and Chippewa, July 31, 1855, 11 Stat. 621 ("Ottawa & Chippewa Treaty") at Art. I § 8.
[33] 1855 Annual Report of the COIA at 1, SC012828-39, SC012828, cited in Anderson Main Rep. at 17, attached as Ex. 12.
[34] *Id.* at SC012838.

then-isolated nature. He wrote that Isabella County was then "about fifty miles beyond any considerable white settlement, and most of the way without any road whatever, and through that heavy timbered land."[35] Once they arrived, he commented that "[t]he country is a vast unbroken wilderness, without even roads that are better than deer paths."[36] Local businessmen corroborated that, as late as 1869, the Isabella Reservation was recognized as a distinct area that "upon all sides presents an unbroken barrier against any intermingling with the whites[,]" and "stands as a solid unbroken wilderness in our midst with not a single comfortably passable road through it, and no very considerable portion of it in a state of cultivation."[37]

Band members could not select allotments from land within the six townships that had already been patented, "sold," or otherwise selected before the withdrawal because it would have displaced existing land rights. Thus, the Treaty only allowed the Band members to select allotments from the withdrawn "unsold lands."[38] But which lands were "unsold" was not apparent by walking across the land—it largely remained wilderness. And local officials were plagued by conflicting land lists and bad surveys.[39] Even the federal government lacked understanding of which lands were sold or unsold within the Isabella Reservation at the time of

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[35] Methodist Episcopal Church, Missionary Society, 38th Annual Report (1857) at 87, SC013267-71, cited in White Main Rep. at 13, attached as Ex. 13.

[36] *Id.* at SC013270.

[37] Citizen Petition (n.d. 1869), SC023091-93 (T.), SC023097-104 (orig.), cited in Anderson Main Rep. at 35, attached as Ex. 14. This petition complained that "[o]n the 2nd day of August A.D. 1855 a Treaty was made and concluded with the Chippewas of Saginaw, Swan Creek and Black River in the State of Michigan, by which six contiguous townships of land were withdrawn from market and set apart as a Reservation for said Indians[,]" that "[t]hese Indians have now lived on the Isabella Reservation some thirteen years[,]" and that "three-eighths of the area of the County, embracing more than 125,000 acres . . . is completely locked up[.]" *Id.* at SC023092 (emphasis in original). Though non-parties' understanding of the Treaty terms is not relevant to interpreting the Treaty, such statements can provide circumstantial evidence of historical facts.

[38] *See* 1855 Treaty at Art. I.

[39] *See, e.g.*, Anderson Main Rep. at 18-29.

the 1855 Treaty,[40] and difficulties were only compounded by the timber speculators who also sought access to the lands.[41]

Immediately after the Treaty was made, in September 1855, Commissioner of the General Land Office Thomas Hendricks informed Acting Commissioner of Indian Affairs Charles Mix that there were problems with the way the treaty set land aside, stating that there simply weren't enough townships with "vacant" land in the area.[42] Regardless, in February of 1856, Henry Gilbert submitted a schedule of the lands under the terms of the 1855 Treaty.[43] The General Land Office still protested, citing conflicts with earlier selections of land within the area under military warrants.[44] Manypenny apparently countered that the Executive Order of May 14, 1855 nullified such selections, but the Secretary of the Interior upheld the military selections, stating that the withdrawal was effective as of the date the Executive Order was actually received at the relevant land office, May 22, not the date of its execution, May 14.[45]

Other pre-existing, but largely unmapped, land interests cropped up within the reservation as initially selected. For example, in addition to military warrants, Michigan claimed certain swamp lands therein.[46] Therefore, Gilbert prepared and submitted a revised list of townships that expressly avoided the military warrants and other land interests, thereby giving "six townships as promised by the treaty," and preserving a contiguous block of land for the

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[40] *See, e.g.*, *Michigan Land & Lumber Co. v. Rust*, 168 U.S. 589 (1897) (deciding between conflicting land claims within the Ionia district).
[41] *See generally*, Anderson Main Rep. at 28 *et seq.*
[42] Hendricks to Mix (Sept. 8, 1855), SC022676-79, cited in Anderson Main Rep. at 18, attached as Ex. 15.
[43] Gilbert to Manypenny (Feb. 25, 1856), US002303-18, cited in Frederick Hoxie Main Rep. at 59, attached as Ex. 16.
[44] Hendricks to Manypenny (Apr. 1, 1856), US002319-22, cited in Hoxie Main Rep. at 59, attached as Ex. 17.
[45] Hendricks to Manypenny (Apr. 9, 1856), US002323-25; R.W. McClelland to Manypenny (Apr. 14, 1856), US002326-28, cited in Hoxie Main Rep. at 59, attached as Ex. 18.
[46] *See, e.g.*, Anderson Main Rep. at 22-26.

Indians as separate from white settlement as was still possible.[47] Regardless, these and other problems resulted in conflicting land claims, and by 1864 (nine years later), much to their consternation, no patents had yet been issued to the Indians.[48]

Many of the United States' other promises in the 1855 Treaty also were not forthcoming. Agent Gilbert reported in the fall of 1856 that "[n]othing has yet been done under the treaty of August 2, 1855," noting the government's failure to provide annuities, construct a saw mill, and render other support.[49] A.M. Fitch, who later replaced Gilbert as the local Indian Agent, reported in the fall of 1858 that "many of the Chippewas of Saginaw removed a year since to the reservation assigned to them in Isabella county, where, after spending the very long and severe winter, they found themselves in the spring reduced to extreme destitution and suffering for want of food."[50] A year later, he again visited "their reservation" and found them "in great want."[51]

Regardless, during this time Band members and federal representatives alike generated records reflecting that their understanding was that the areas defined in the treaty were, indeed, reservations within which selections could be made. In May 1858, various Band members petitioned President Buchanan regarding various unfulfilled 1855 Treaty provisions:[52] "By clause the second article first we were entitled to land from the general government to be located in our reservations immediately after the treaty was ratified . . . Yet no locations have been made

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[47] Gilbert to Manypenny (June 19, 1856), SC022725-26, cited in Anderson Main Rep. at 18, attached as Ex. 19.
[48] *Id.*
[49] Mackinac Agency Rep. (Oct. 23, 1856), in 1856 Annual Rep. of the COIA, US02336-38, cited in Hoxie Main Rep. at 60, attached as Ex. 20.
[50] Mackinac Agency Rep. (Nov. 10, 1858), in 1858 Annual Rep. of the COIA, SC05328-34, cited in Anderson Main Rep. at 25, attached as Ex. 21.
[51] Fitch to Greenwood (June 21, 1859), SC022784-89, cited in White Main Rep. at 13, attached as Ex. 22.
[52] Saginaw Pet. (May 27, 1858), US002344-50, cited in Hoxie Main Rep. at 60, attached as Ex. 23.

and your present agent the Rev. A. M. Fitch refuses to make them for us."[53]

> On the federal side, in his 1858 Michigan Agency report, Fitch recounted that:
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> Two reservations, by the treaty of 1855, were provided for these Indians; one of them, which was designed for what is called the Bay Indians, is entirely unsuited for agricultural purposes, there being but little land that can be used for that purpose. They are unanimous in requesting a new reservation in lieu of the one granted in the treaty referred to, and are waiting with some anxiety for a decision in this matter.[54]

The next Indian Agent, D.C. Leach, echoed the same understanding in 1863, expressly reading the treaty as having set aside the entire area of the townships as reservations:

> The Chippewas of Saginaw, Swan [C]reek, and Black [R]iver have two reservations. The larger, and by far the more valuable and important, is situated in Isabella [C]ounty. It covers an area of something over two hundred square miles and is inhabited by about fifteen hundred Indians.[55]

IV. Lead-in to 1864 Treaty

In February 1864, various chiefs of the Bands that had settled on the Isabella Reservation again petitioned the President, specifically asking for a new treaty and for additional protections for their reservation:

> Whereas we made a mistak [sic] or overlooked one thing in our Treaty and did not make any provision for our young men and women to have any land when they should be of age.
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> Now we are so situated here on our Reservation in Isabella County, that if the land is brought into market and white men come and settle among us, we fear it will disturb us verry [sic] much and break up our settlement. [56]

In April 1864, Indian Agent Leach forwarded the petition to new Commissioner of Indian

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[53] *Id.*

[54] Mackinac Agency Rep., 1858 Annual Rep. of the COIA, SC05331, Ex. 21.

[55] Leach to Dole, Mackinac Agency Report (Oct. 17, 1863), in 1863 Annual Rep. of the COIA, MI001038-41, cited in Gulig Main Rep. at 65, attached as Ex. 24.

[56] Petition of Chiefs to President (Feb. 15, 1864), SC022761-63 (orig.), SC002526-27 (T.), cited in White Main Rep. at 19, attached as Ex. 25. The petitioners requested that the government pay their final annuity in land patents rather than in cash. *Id.*

Affairs William P. Dole, noting also that the Bay Indians were now willing "to remove to the principal Reservation in Isabella [C]ounty."[57]

In early September, Commissioner Dole wrote to Treaty Commissioner H.J. Alvord that "[i]t is understood that those living on the reserve at Saginaw Bay are willing to relinquish their reserve and in lieu thereof receive two townships on the tract of land withheld for Indian purposes in Isabella county."[58] Dole instructed Alvord to negotiate with the Bands for the relinquishment of their Saginaw Bay Reservation, so that instead the Bands could "be accommodated on the Isabella County reserve." [59]

V. 1864 Treaty

The 1864 Treaty itself included multiple references to the already-existing Isabella Reservation and to land selections "upon" or "within" it.[60] For example, the parties concluded the new treaty "at the Isabella Indian reservation, in the State of Michigan," on October 18, 1864.[61] Moreover, the 1864 Treaty referred to the 1855 Treaty as having set aside townships for the Bands, not just the "unsold lands" in those townships: the Bands relinquished "*the several townships of land reserved to said tribe by said treaty aforesaid [the 1855 Treaty], situate[d] and being upon Saginaw Bay in said State.*"[62] They further gave up "all claim to any right they may possess to locate lands in lieu of lands sold or disposed of by the United States upon their

[57] Leach to Dole (Apr. 9, 1864), SC002535-36 (T.), SC002543-45 (orig.), cited at White Main Rep. at 19, attached as Ex. 26.
[58] Dole to Alvord (Sept. 3, 1864), SC017105-08, cited at White Main Rep. at 20, attached as Ex. 27.
[59] *Id.*
[60] *See generally*, Treaty with the Chippewa of Saginaw, Swan Creek, and Black River, Oct. 18, 1864, 14 Stat. 657 ("1864 Treaty"), attached as Ex. 28.
[61] 1864 Treaty at Preamble.
[62] *See* 1864 Treaty at Art. I (emphasis added).

reservation at Isabella."[63]

The 1864 Treaty also overrode the 1855 Treaty's time restrictions on allotment, instead allowing the process to continue until all remaining "unsold" parcels within the reservation were allotted to Band members.[64] Specifically, it gave selection rights to "each other person now living or who may be born hereafter when he or she shall have arrived at the age of twenty-one years, forty acres, so long as any of the lands in said reserve shall remain unselected, and no longer."[65] And the 1864 Treaty specifically confirmed that the 1855 Treaty "reserved" for the Bands:

> [t]he north half of township fourteen, and townships fifteen and sixteen north, of range three west; the north half of township fourteen and township fifteen north, of range west, and townships fourteen and fifteen north, of range five west.[66]

That block of land was "set apart for the exclusive use, ownership, and occupancy" of the Bands.[67]

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[63] *Id.*

[64] 1864 Treaty at Art. III. Unfortunately, settlers and land speculators *still* purchased land within the Isabella Reservation. *E.g.* Usher to Edmunds (Dec. 2, 1864), SC023046-49, cited at Anderson Main Rep. at 22 (discussing sales within "Reservation" and ordering them to cease), attached as Ex. 29; Bradley to Alvord (Dec. 6, 1864), SC023037-40, cited at White Main Rep. at 22 (describing ongoing land frauds and the response that "the Indians say they feel ugly and the Copperhead Indians laught [sic] at all those who are Republicans and say what a Father you have got, he is just fooling you" (emphasis in original), attached as Ex. 30; Fancher to COIA (March 26, 1866), SC028818-25, cited in White Main Rep. at 22 (describing "considerable" land purchases and asking "[w]hat will be done with that?"), attached as Ex. 31.

[65] *Id.*

[66] 1864 Treaty at Art. II. These legal descriptions correspond to the federally and Tribally recognized boundaries of the Isabella Reservation today. *See*, *e.g.*, U.S. Census Boundary Maps, Isabella Reservation (2000), attached as Fig. 23-a-c to White Map Ex., Doc. 191-6, attached here in color at Ex. 32.

[67] *Id. See also* 1864 Treaty at Art. III (discussing "selections of lands upon the Isabella reservation").

VI. Post-1864 Treaty

The Court has already recognized that an interpretation of treaty language has diminishing relevance to the task of treaty interpretation the farther away in time the interpretation arises after the treaty was concluded.[68] Similarly, where the interpreter of treaty language was not directly involved with making the treaty, even if he or she is purporting to speak from a position of authority on behalf of either party to the treaty, the Court must carefully weigh the value of those statements to determine authenticity, the motive of the author, and other factors.[69] Even so, the most relevant post-treaty statements are typically those made close in time to the treaty and by the members of the tribe and federal agents who entered the treaty (although they still must be carefully weighed). The Court has also recognized that it is the intent of the parties, with emphasis on Indian understanding, that controls treaty interpretation.[70]

A. Statements by Tribal actors

Because the questions of specific reservation boundaries or jurisdiction were not a primary concern for Band members who were struggling to survive in the mid- to late-1800s, few documents address this question directly. But as before the 1864 Treaty, many Tribal petitions following the Treaty demonstrate an understanding of the Isabella Reservation as perpetual and contiguous—an area Band members lived "upon" or "at," and within which they made selections. For example, a June 1869 Tribal petition to President Johnson states that it was drafted "at a general counsel of the Chippewas of Saginaw Swan Creek and Black River [B]ands of Indians living on the Reservation in Isabella County[.]" It states that "about fifteen thousand

[68] *See, e.g.*, Order Denying Motions to Exclude the Testimony of Expert Witnesses (Feb. 4, 2010), Doc. 221, at 31, 33.
[69] *Id.*
[70] *See, e.g.*, Op. and Order Granting U.S. Mot. in Limine and Granting Saginaw Mot. to Strike (Apr. 29, 2009), Doc. 161, at 7-10.

acres (15,000) acres of our Reservation has been sold to White men . . . without our consent and contrary to our wishes, most of which has been selected by our people under the Treaty[.]" It concludes by asking that the President annul the recent purchases and "give us our land as we have located it under Treaty of Aug. 2, 1856 [sic] & Oct. 1864."[71]

In a December 19, 1870 petition, chiefs and other leaders of the Bands used language of permanence when they wrote to the President to request patents to land within the "Reservation," and stated that "we made Treaties with your commissioners, one in 1855 and one in Oct 18th 1864, by which we supposed we were getting a <u>home</u> for ourselves and our children[.]"[72]

On June 5, 1871, other Band leaders sent out a petition criticizing former Indian agent Major Long, and seeking to protect their "settlement":

> We the undersigned chiefs and principal men met in council we wish to say a few words to our Great Father in Washington viz your red Children are alarmed that the wicked white men give whiskey to the Indians and buy their land from them for a little money and the white men determined to break up the settlement and it may be possible that Major Long might give them deeds under our Notice—and since he's agent everything went wrong—and we humbly beg to our Great Father President to stop this our hurt—and your Petitioners will each pray.[73]

Another petition in September 1871 reflected faith in Agent Smith and echoed the Indians' desire for the government's help regarding their land, to continue their guardianship, and to maintain the integrity of their separate "settlement."[74]

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[71] Indian Petition (June 4, 1869), SC17381-84 (T.), SC17389-96 (orig.), SC17384, cited in White Main Report at 23, attached as Ex. 33.

[72] Indian Petition (Dec. 19, 1870) (emphasis in original), SC023266-274, cited in White Main Report at 23, attached as Ex. 34. *See also, generally*, Valentine Main Rep. at 15-18 (describing Ojibwe analogical expressions of permanence and perpetuity), *available at* Doc. 193.

[73] Petition of Lyman Bennett and Others, June 5, 1871, Mackinac Agency, cited in Anderson Reb. Rep. at 20, Ex. F, attached as Ex. II to Tribe's Motion to Exclude the Testimony of Drs. Theodore Karamanski and Anthony Gulig (Nov. 23, 2009), SC034163-66, Doc. 196-19, attached here as Ex. 35.

[74] *See* Petition done at Isabella (Sept. 16, 1871), SC002807-10, cited in Anderson Reb. Rep. at 21, attached as Ex. JJ to Tribe's Mot. to Exclude, Doc. 196-20, attached here as Ex. 36.

Many Tribal petitions addressed concerns over land frauds, but consistently used language reflecting an understanding that the Reservation was a distinct territory. In an 1872 petition, Chiefs and other leaders of the Bands asked the Commissioner of Indian Affairs to "examine into the affairs of the Indian Agency of this State with reference to the Isabella Reservation" with reference to five specific land-fraud concerns.[75] The petitioners further asked: "[c]an any law be adopted to protect the Indians on the Reservation in the process[?]"[76] In a June 1881 Petition, Chief Noge-che-qaw-me wrote to the Secretary of the Interior asking for assistance with the current Indian agent, referring to the land-selection process designed "when the Isabella reservation was laid out" and the "allotments of land at Isabella."[77]

In a petition dated March 1890, various Band members signed the record of a council meeting regarding land selections, and stated that they were "located on the reservation in Isabella County."[78] Likewise, in January 1882, Band members meeting in council identified themselves as "residing upon the Isabella Indian Reservation" and complained of timber trespasses on their "reserved" lands.[79]

The single outlying record in this stream of documents indicating the Indian understanding that the Isabella Reservation was contiguous and perpetual is the May 1871 petition the Defendants often reference.[80] But it is now undisputed that, at best, this petition

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[75] Indian Petition (1872), SC23382-89, cited in White Main Report at 25, attached as Ex. 37.
[76] *Id.*
[77] Chief Noge-che-qaw-me to Sec'y (June 16, 1881), SC030666-68, cited in Anderson Main Rep. at 57, attached as Ex. 38.
[78] Chief Joseph Bradley and Sec'y Samuel Davis to COIA (March 24, 1890), SC031078-89, cited in Anderson Main Rep. at 71, attached as Ex. 39.
[79] Various Band members to Lee (Jan. 6, 1882), SC030679-85, cited in Anderson Main Rep. at 80, attached as Ex. 40.
[80] *See* May 1871 Pet., Ex. FF to Tribe's Motion to Exclude the Testimony of Drs. Theodore Karamanski and Anthony Gulig (Nov. 23, 2009), MI000133-39, Doc. 196-16.

represents the views only of one tribal faction, and the State's experts concur that several contrary, contemporaneous petitions bear markers of authenticity.[81]

B. Post-treaty statements by federal actors

Many documents after the 1864 Treaty reflect the federal understanding of the Reservation both as perpetual and as a contiguous, bounded territory. At the end of October 1864, Alvord wrote to Commissioner Dole summarizing the treaty negotiations, stating that "[t]he Indians living upon this reservation are in a most prosperous condition" and that in council he had told them that it was "the wish of the government that they should all live together upon one reservation and if they would consent to do so that the Government would treat with them upon very liberal terms."[82] In early December 1864, even before the president referred it for ratification, federal agencies took action to designate the area as a "Reservation" and to stop land sales therein.[83] In late December, new Indian Affairs Commissioner Dole wrote to Secretary of Interior John P. Usher urging haste in ratifying the treaty due to "recent attempts by white speculators to get possession of the valuable pine lands upon the reservation at Isabella."[84] In January 1865, Usher sent the document to the President, stating that the agreement has been made "at the Isabella Indian Reservation," in the State of Michigan.[85] That same month, President Abraham Lincoln affixed his name to the document, identifying the agreement as having been "concluded at the Isabella Indian Reservation."[86]

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[81] Kara. Depo. at 369:5-9, Ex. P to Tribe's Motion to Exclude, Doc. 194-5; *see also id.* at 366:11-12 ("There's a war going on here between tribal factions."); Gulig Depo. at 406:19-24, Ex. M to Tribe's Motion to Exclude, Doc. 194-2.
[82] Alvord to Dole (Oct. 31, 1864), SC003374, cited at White Main Rep. at 20, attached as Ex. 41.
[83] *See, e.g.*, Usher to Edmunds (Dec. 2, 1864), SC023046-49, Ex. 29.
[84] Dole to Usher (Dec. 22, 1864), in 33rd Cong. 2d sess. Exec. H. Papers, SC018375-78, SC018378, cited in Anderson Main Rep. at 10-11, attached as Ex. 42.
[85] Usher to Pres. Lincoln (Jan. 17, 1865), *id.*, SC017378, Ex. 42.
[86] Pres. Lincoln to Senate (Jan. 17, 1865), *id.*, SC018375, Ex. 42.

In November 1866, Special Agent and treaty negotiator H.J. Alvord visited and reported that Tribal members were farming their allotments.[87] Likewise, in his October 1870 report describing the Bands, Agent James Long reported that: "their reservation lies in Isabella County."[88] Moreover, "part of their reservation is composed of the finest farming lands in the State. On other portions of it pine abounds, and this attracts a crowd of speculators anxious to secure it for their respective mills."[89]

Thereafter, the new Agent, Betts, in his 1873 Report described the 1855 Treaty, plainly stating that "[i]n 1855 there were set apart for them as a perpetual reservation six adjoining townships of land in the County of Isabella."[90] In the handwritten survey he supplied with his 1874 COIA Report, he lists the Isabella Reservation as including 138,240 acres—the entire six-township area.[91]

The Commissioner of Indian Affairs, too, continued to view the Reservation as a contiguous block of land set aside for the Bands. In describing the Reservation, in February 1880, Acting Commissioner Orlando Brown stated:

> That portion of the Isabella Reservation which has not been granted to individual Indians in fee simple, does not come within the definition of public lands, the same having been withdrawn from the public domain, and set apart in common with other lands as a reservation held in trust.[92]

In another example, on September 1, 1881, later Commissioner of Indian Affairs Price

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[87] *Id.*

[88] Mackinac Agency Rep. (Oct. 20, 1870), in 1870 Annual COIA Rep. at 779, SC017517-21, SC017520, cited in Anderson Main Rep. at 43, attached as Ex. 43.

[89] *Id.* Ironically, Long was later known for heavy involvement and facilitation of timber speculation on the Reservation. *See, e.g.*, Anderson Main Rep. at 35-42.

[90] Mackinac Agency Rep. (1873), in 1873 Annual COIA Rep., SC017194-96, cited in Anderson Main Report at 51, attached as Ex. 44.

[91] Mackinac Agency Rep. (1874), in 1874 Annual COIA Rep., SC029128-3, cited in Anderson Main Rep. at 51-52, attached as Ex. 45.

[92] COIA Brown to Webber (Feb. 16, 1880), SC026896-99, SC026897, cited in Anderson Main Rep. at 55, attached as Ex. 46.

responded to the letter of S. D. Coon, an attorney in Isabella County who sought to purchase land within the Isabella Reservation.[93] In response to Mr. Coon's inquiries, the Commissioner stated that "the Isabella Indian reservation in Isabella, County, Michigan, was established by Executive Order of May 14, 1855; treaties of August 2d, 1855, and October 18, 1864."[94] He further stated that "[n]o steps are being taken to discontinue the reservation."[95]

This understanding was shared by other top-level federal officials. In June 1886, the Attorney General of the United States, A.H. Garland, wrote to the Secretary of the Interior regarding prosecutions for "trespasses and land frauds within the Isabella Indian Reservation in Michigan," recommending that suit be brought against the offenders.[96]

On October 9, 1888, a full 24 years after the 1864 Treaty, Acting Commissioner of Indian Affairs Upshaw again confirmed the same understanding of the Reservation.[97] In a letter to W. H. Ward, an attorney in Isabella County, the Commissioner advised Ward that the actions of local land officers "receiving and allowing entries on any lands in the Isabella Reservation was entirely without authority of law, there being no lands in that reservation subject to sale or

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[93] Price to Coon (Sept. 1, 1881), SC032030-32, cited in Anderson Main Rep. at 56, attached as Ex. 47.

[94] *Id.*

[95] *Id.* Federal statements such as these reacted to the ongoing efforts of local settlers to enter the Isabella Reservation. For example, in June 1868, the entire Michigan congressional delegation joined the petition of private citizens to the Commissioner of Indian Affairs asking that all lands within the Isabella Reservation (along with other Michigan reservations) be subject to sale under public-land laws. Citizens to Sec'y of the Int. Browning (June 5, 1868), SC002592-95 (orig.), SC023137-38 (T.), cited in Anderson Main Rep. at 32, attached as Ex. 48. The petition complained that the reservation at Saginaw Bay had been relinquished by the 1864 Treaty "while by the same treaty the reserve at Isabella has been made perpetual." *Id.*

[96] Garland to Sec'y of Int. (June 24, 1886), SC030945-47, cited in Anderson Main Rep. at 63, attached as Ex. 49.

[97] Upshaw to Ward (Oct. 9, 1888), SC32096, cited in Anderson Main Report at 66, attached as Ex. 50.

entry."[98] He continued that "[t]hose persons who have made entries will not be allowed to go upon the lands entered by them, such lands being reserved for Indian purposes."[99]

But perhaps the most striking documents showing federal recognition of the well-defined, six-township Isabella Indian Reservation are its official maps. The Indian-lands maps published by the Commissioner of Indian Affairs through the end of the 19th century showed Isabella as a six-township reservation.[100]

CONCLUSION

The Rules of Appellate Procedure state that the record on appeal consists *only* of the "original papers and exhibits *filed* in the district court"; "the transcript of proceedings, if any"; and "a certified copy of the docket entries prepared by the district clerk."[101] None of the primary-source documents that the Tribe cites here should surprise the Defendants—each document was exchanged as part of the expert disclosures long ago, and all parties have had the chance to depose the experts regarding these documents. But this is the first time any party has entered the vast majority of these documents into the record. It is critical that the Court is able to point directly to the portions of the record (including primary-source documents) that support its decisions.

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[98] *Id.*

[99] *Id.*

[100] *See, e.g.*, State of Mich. Map (GLO 1888), attached as Ex. 51; Map Showing Indian Reservations Within the Limits of the U.S. (COIA 1890), attached as Ex. 52; Map Showing Indian Reservations Within the Limits of the U.S. (COIA 1895), attached as Ex. 53; Royce Map, Mich. 2 (1899), attached as Ex. 54.

[101] Fed. R. App. P. 10(a) (emphasis added). *See also* 6 Cir. E. 10(a) ("The record on appeal is comprised of the items specified in FRAP 10.").

Dated: April 6, 2010

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Certificate of Service

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